BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 5193 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

WILLIAM SHAFFER
(Claimant)
S.S.A. No.

NORRIS STAMPING & MFG. CO.
(Appellant-Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-189

FORMERLY
BENEFIT DECISION
No. 5193

The above-named employer on May 11, 1948, appealed from the decision of a Referee (LA-12220) which held that the claimant was not subject to disqualification under Section 58(a)(2) of the Unemployment Insurance Act (now section 1256 of the Unemployment Insurance Code).

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed by the employer herein for eleven years as a leadman in the welding department. This employment terminated on February 13, 1948, for reasons hereinafter set forth.

On March 1, 1948, the claimant registered for work and filed a claim for benefits in the Huntington Park office of the Department of Employment. The employer protested the payment of benefits and on March 17, 1948,

the Department issued a determination which disqualified the claimant for a five-week period commencing March 1, 1948, based upon a finding that he had been discharged for misconduct connected with his most recent work within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code). The claimant appealed and a Referee reversed the determination. The employer appealed to this Appeals Board on the ground that the claimant voluntarily resigned his position with the employer without good cause. The employer also contended that the claimant refused offers of suitable employment and that he was not available for work.

During the course of his eleven years' employment with the employer herein the claimant had engaged in various gambling activities on the employer's premises during working hours. The claimant had been warned on many occasions to cease such practice as it was in violation of company rules. Some eight months prior to termination the claimant had been warned that any further infraction of the rule would result in his discharge. On or about January 30, 1948, the claimant obtained a leave of absence for one week in order to take care of certain domestic and personal responsibilities. He returned to the employer's plant the following week and requested another week's leave of absence in order to help out a friend who was incapacitated. This request was directed to the plant superintendent who denied the request and advised the claimant to submit his resignation in lieu of discharge whereupon the claimant submitted his resignation without protest.

The employer stated that if the claimant had not voluntarily resigned he would have been discharged, but that the option was given to the claimant because of his length of service with the company and because they did not desire to affect his future employment possibilities with other employers by reporting his termination as a discharge for misconduct. The claimant's resignation was requested because the employer had received information that the claimant had used the latter portion of his week's leave of absence for purposes other than for which the leave was granted. The claimant admitted that he had engaged in gambling activities, without profit, during the last few days of this leave of absence, but stated that he had several other personal affairs to attend to and was of the opinion that since the leave had been granted for a full

week there was no necessity for his return until the expiration of the week. The company rules provide that all leaves of absence are granted with the proviso that the individual obtaining such leave shall not engage in other work for profit. The employer's request that the claimant submit his resignation was occasioned by the claimant's having violated the rules of the company regarding leaves of absence, but the reason for requesting the resignation was based upon the claimant's previous disregard of repeated warnings regarding his gambling activities, which, considered in conjunction with the latest incident, caused the employer to dispense with the claimant's services.

The claimant testified that he would accept any work for which he was qualified at a "fair wage", and that he would accept work within his experience as a welder at a wage of $1.25 per hour. The prevailing scale for spot welding machine operators is $1.25 to $1.30 per hour. The claimant has been actively seeking work and no evidence was presented to show that he had refused any specific offers of work.

REASON FOR DECISION

In the instant case it is our opinion that the claimant did not voluntarily leave his employment with the employer herein despite the fact that he submitted his resignation. It is apparent that the employer left the claimant with no alternative but to resign since it was made clear to him that he would be immediately discharged if he did not comply with the employer's request. Therefore, we hold that the claimant is not subject to disqualification for benefits under Section 58(a)(1) of the Unemployment Insurance Act (now section 1256 of the code). The employer has contended, however, that the circumstances under which the claimant's services were terminated constituted a discharge for misconduct.

Section 58(a)(2) of the Act (now section 1256 of the code) provides as follows:

"Sec. 58. (a) An individual shall be disqualified for benefits if:

> "(2) He has been discharged for misconduct connected with his most recent work, if so found by the commission; provided that, an individual shall be presumed to have been discharged for reasons other than misconduct in connection with his work and not to have voluntarily left his work without good cause unless his employer shall have given notice to the contrary to the commission in writing within five days after the termination of service, setting forth such facts as are necessary to establish a prima facie case in support thereof. If the employer files such notice, the question shall immediately be determined in the same manner as benefits claims; . . ."

Appeals involving the application of the above section of the law have been before us in prior cases and we have held that in order to constitute misconduct within the meaning of this disqualification a claimant must have materially breached a duty owed the employer under the contract of employment which breach tends substantially to injure the employer's interest.

In our opinion the act which occasioned the claimant's discharge was not in itself sufficiently connected with the work or in violation of the employer's interest to justify imposition of the disqualification provided by Section 58(a)(2) of the Act (now section 1256 of the code). It is undisputed that the claimant had requested and obtained a definite leave of absence of one week's duration and that he devoted a portion of that leave to the purposes for which it was granted. We cannot find on the present record that there was anything but a moral obligation on the claimant to return to work when he had taken care of his domestic responsibilities and, in fact, the claimant testified that he had other personal affairs requiring his attention for the balance of the week. The employer has not shown that the claimant's absence in any way affected the employer's interests, and any gambling activities the claimant may have engaged in during this period were not on the employer's premises or under circumstances connecting the claimant with the employer. The claimant's further request for an extended leave of absence cannot be considered as an additional ground for discharge since the employer had already determined to discharge the claimant when the request

was made. We have no disagreement with the employer's statement that the claimant was discharged because of his record over a period of years of frequent violations of the company rule prohibiting gambling during working hours on the company premises, and that the immediate occasion for his discharge was attributable to the cumulative effect of his prior violations of this rule. However, the acts complained of occurred over a period of years and though the claimant had been warned that one more violation of the rule would result in his discharge, this warning was given with respect to the claimant's activities during working hours and while on the company premises. The occasion for the claimant's discharge was not for violation of this rule for he was on leave of absence at the time and away from the employer's place of business. Under all the facts and circumstances of this case we conclude that the claimant was not discharged for misconduct connected with his most recent work within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code).

It is our further opinion on the facts before us that the claimant has imposed no unreasonable restrictions or limitations on acceptable employment thereby meeting the availability requirements of Section 57(c) of the Act (now section 1253(c) of the code) and that he has not refused any offers of suitable employment within the meaning of Section 58(a)(4) of the Act (now section 1257(b) of the code).

DECISION

The decision of the Referee is affirmed. Benefits are allowed provided the claimant is otherwise eligible.

Sacramento, California, November 19, 1948.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

PETER E. MITCHELL (not voting)

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5193 is hereby designated as Precedent Decision No. P-B-189.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT